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8 IN THE UNITED STATES DISTRICT COURT FOR THE
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10 EASTERN DISTRICT OF CALIFORNIA

11 THE UNITED STAES OF AMERICA

12 V.

13 KEVIN STERN

14 Case Number: 21-0021 MCE

15 **STIPULATION AND ORDER**

16 **DATE: September 8, 2021**

TIME: 10 am

DEPT: MCE

17 This case is set for a status conference on September 9, 2021. By this stipulation, the
18 parties request a continuance of the status conference to November 18, 2021, and to exclude time
19 under Local Codes T2 and T4, for the reasons set forth below.

20 On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in
21 the Eastern District of California “until further notice.” Further, pursuant to General Order 611,
22 this Court’s declaration of judicial emergency under 18 U.S.C. § 3174, and the Ninth Circuit
23 Judicial Council’s Order of April 16, 2020 continuing this Court’s judicial emergency, this Court
24 has allowed district judges to continue all criminal matters to a date after May 2, 2021
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1 Although the General Orders and declarations of emergency address the district-wide
2 health concern, the Supreme Court has emphasized that the Speedy Trial Act's end-of-justice
3 provision "counteract[s] substantive openendedness with procedural strictness," "demand[ing]
4 on-the-record findings" in a particular case. (*Zedner v. United States*, 547 U.S. 489, 509 (2006)).
5 "[W]ithout on-the record findings, there can be no exclusion under" § 3161(h)(7)(A). (*Id.* at
6 507). Moreover, any such failure cannot be harmless. (*Id.* at 509); see also *United States v.*
7 *Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a judge ordering an ends-
8 of-justice continuance must set forth explicit findings on the record "either orally or in writing").

9 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both
10 mandatory and inexcusable—General Orders 611, 612, 617, and 618 and the subsequent
11 declaration of judicial emergency require specific supplementation. Ends-of-justice continuances
12 are excludable only if "the judge granted such continuance on the basis of his findings that the
13 ends of justice served by taking such action outweigh the best interest of the public and the
14 defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable
15 unless "the court sets forth, in the record of the case, either orally or in writing, its reason or
16 finding that the ends of justice served by the granting of such continuance outweigh the best
17 interests of the public and the defendant in a speedy trial." (*Id.*)

18 The General Orders and declaration of judicial emergency exclude delay in the "ends of
19 justice." 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not
20 directly address continuances stemming from pandemics, natural disasters, or other emergencies,
21 this Court has discretion to order a continuance in such circumstances. For example, the Ninth
22 Circuit affirmed a two week ends-of-justice continuance following Mt. St. Helens' eruption.
23 *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption
24 made it impossible for the trial to proceed. *Id.* at 767-68; see also *United States v. Correa*, 182 F.
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1 Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11,
2 2001 terrorist attacks and the resultant public emergency).

3 The coronavirus poses a similar, albeit more enduring, “appreciable difficulty” to the
4 prompt proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a
5 “non-exhaustive” list of seven factors it found to be “relevant” in considering ends-of-justice
6 Speedy Trial Act continuances “in the context of the COVID-19 pandemic.” United States v.
7 Olsen, --- F.3d ---, 2021 WL 1589359 at *7 (9th Cir. Apr. 23, 2021). That non-exhaustive list
8 includes: (1) whether a defendant is detained pending trial; (2) how long a defendant has been
9 detained; (3) whether a defendant has invoked speedy trial rights since the case’s inception; (4)
10 whether a defendant, if detained, belongs to a population that is particularly susceptible to
11 complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and
12 in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to
13 suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district
14 court has the ability to safely conduct a trial. *Id.*

15 In light of the societal context created by the foregoing, this Court should consider the
16 following case-specific facts in finding excludable delay appropriate in this particular case under
17 the ends-of-justice exception, § 3161(h)(7) (Local Code T4). If continued, this Court should
18 designate a new date for the hearing. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir.
19 2010) (noting any pretrial continuance must be “specifically limited in time”).

20 Further, discovery in the mater at bar is voluminous, to include wiretaps. Counsel is in
21 the process of reviewing discovery and consulting with his client.

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STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, hereby stipulate as follows:

1. This matter was set for status on September 9, 2021.
2. By this stipulation, defendants now move to continue the status conference until **November 18, 2021, at 9:00 a.m.**, and to exclude time between September 9, 2021, and November 18, 2021, under Local Code T4.
 3. The parties agree and stipulate, and request that the Court find the following:
 - a) The government has represented that the discovery associated with this case to date includes more than many pages of investigative reports, photographs, affidavits, and other documents, approximately, recorded phone calls intercepted pursuant to the Title III wiretap; and other video and audio recordings. All of this discovery is in the process of being produced directly to counsel and made available for inspection and copying.
 - b) Counsel for defendant needs additional time to review the discovery in this case, to conduct independent factual investigation, to research trial and sentencing issues, to consult with client, and to otherwise prepare.
 - c) Counsel for defendant believes that failure to grant the above-requested continuance would deny him the reasonable time necessary for effective preparation, taking into account the nature of due diligence.
 - d) The government does not object to the continuance.
 - e) Based on the above-stated findings, the ends of justice served by continuing the case as scheduled outweigh the interest of the public and the defendant in a trial within the original date set by the Speedy Trial Act.

1 f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161, et
2 seq., within which trial must commence, the time period of September 9, 2021 to November 18,
3 2021, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code
4 T4] because it results from a continuance granted by the Court at defendant's request on the basis
5 of the Court's finding that the ends of justice served by taking such action outweigh the best
6 interest of the public and the defendant in a speedy trial.

7 4. Nothing in this stipulation and order shall preclude a finding that other provisions of
8 the Speedy Trial Act dictate that additional time periods are excludable from the period within
9 which a trial must commence.

10 IT IS SO STIPULATED.

12 Dated: September 7, 2021

PHILLIP A. TALBERT
Acting US Attorney
/s /Adrian T. Kinsella
ADRIAN T. KINSELLA
Assistant U S Attorney

16 Dated: September 7, 2021

/s/Olaf W. Hedberg
Olaf W. Hedberg
Counsel for Defendant
KEVIN STERN

19 **ORDER**

20 IT IS SO ORDERED.

22 Dated: September 10, 2021


23 MORRISON C. ENGLAND, JR.
24 SENIOR UNITED STATES DISTRICT JUDGE
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